

- T H E -
BOUNDARY LINE
- BETWEEN -
WEST VIRGINIA & MARYLAND.

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The controversy between Maryland and West Virginia, about their boundary line, involves a wedge or triangle of land about three quarters of a mile wide on the Pennsylvania line, with its point or apex terminating some 36 miles south at the "Fairfax Stone." This triangle is bounded on the east by the "Old Maryland line," and on the west by the "New Maryland line," both lines commencing at the Fairfax Stone and terminating in the Pennsylvania line. Both States claim this triangle of land; and if Maryland is correct, it falls within and is part of Garrett County, Maryland; if West Virginia is correct, it falls within and is a part of Preston County, West Virginia, as it is conceded now that the "Fairfax Stone" is the southern corner of these two counties. Both States claim, and are now attempting to exercise jurisdiction over, this disputed territory, and serious conflicts have arisen between citizens of Maryland and West Virginia over claims to the same tracts of land under titles claimed to be derived from their respective States. These controversies about land titles have culminated in

serious personal rencounters and breaches of the peace, which each State has treated as crimes within its jurisdiction, and attempted to punish. Each State has also levied and collected taxes on the same property.

Such a state of affairs ought not to exist. This controversy ought to be ended, and the proper boundary line justly and amicably established. Wearied at last with this "border war," West Virginia concluded to yield her right to the territory in dispute, and transfer the same to Maryland, provided, that State protected her people in their titles derived from the Commonwealth of Virginia. Accordingly, on the 3d day of May, 1887, the Legislature of West Virginia passed an act approving and confirming the "New Maryland line," as the true boundary line between the State of Maryland and West Virginia, but this act was not to take effect until and unless Maryland should, by proper legislation, secure our people in their land titles derived from the Commonwealth of Virginia. We thought it fair and just that if we gave Maryland our territory and turned over our citizens to her, that, at least, they should not be robbed of their property, and especially as Maryland herself before had pledged herself to protect them.

What action the legislature of Maryland took with reference to the said act of our legislature we know not, except, by rumor, that it refused to consider or act upon it, and consulted the Attorney-General of Maryland as to what steps should be taken by that State to settle the boundary line dispute. Desiring to see this opinion, the writer called upon the Attorney-General in Baltimore, and requested a copy, when that officer informed him that the opinion had not been printed, but the substance of it was, that to settle the dispute there were only two ways: one, by a suit of Maryland against West Virginia in the Supreme Court of the United States; the other, by arbitration. The writer then referred to the act of West Virginia, passed May 3, 1887, and the conditions it contained. About this act, the Attorney General expressed his profound ignorance and great surprise, and inquired whether the Governor of West Virginia had ever communicated that act to the Governor of Maryland. This statement is made to show that the Maryland legislature did not think the West Virginia act of sufficient importance or entitled to enough respect, to be laid before the chief legal advisor of that State in the consideration of the question.

To understand properly this boundary question, it will be necessary to review briefly the history of the controversy between Maryland and Virginia, and the respective acts and claims of the two States, with reference to the territory in dispute and the rights of persons acquired therein.

We will premise by saying that the "Old Maryland line" was run in 1788, and the "New Maryland line" in 1859.

The history of the planting of the Fairfax Stone at the first fountain of the north branch of the Potomac is as follows: In 1729, a controversy arose between Virginia and Lord

Fairfax, as to boundary lines. Lord Fairfax succeeded to the proprietorship of Lord Culpepper, who obtained a charter from James II. in the fourth year of his reign, to what was known as the Northern Neck of Virginia. One call in the Culpepper patent in controversy between Lord Fairfax and Virginia, was the establishment of the head or *first fountain* of the Potomac. As there were several branches of the Potomac, heading in the Allegheny Mountains. The controversy was brought before the King in council, who gave judgment that the *first fountain* of the Potomac was at the head of the *north* branch, and in accordance with that judgment the Fairfax Stone was, on the 17th of October, 1746, planted, marking the place adjudged to be the fountain or head of the Potomac. The charter of Charles I., issued in 1632, granting the territory of Maryland to Lord Baltimore, also contained a call for the "first fountain of the Potomac."

The territory of Maryland was described in the charter as "that region bounded by a line drawn from Watkins' point on Chesapeake bay to the ocean on the east, thence to that part of the estuary of Delaware on the north, which lieth under the 40th degree, where New England is terminated; thence, in a right line by the degree aforesaid to the *meridian of the fountain of the Potomac*; thence, following its course by its farther bank to its confluence." (Marshall's Life of Washington, vol. 1, chap. 2.)

Thus, it is plain that the western line of Maryland at its southern limit terminated at the fountain or head of the Potomac. But Maryland, from the time of the Revolution down to 1852, repudiated the "Fairfax Stone" as marking the first fountain of the Potomac within the meaning of the charter to Lord Baltimore.

In 1832, the legislature of Maryland appointed a committee to consider the boundary line question.

That committee reported a historical review of the whole controversy and the various attempts made by Virginia and Maryland to settle the question.

The claim then of Maryland, as shown by the report of this committee, was that the *first fountain* of the Potomac was at the head of the south branch instead of north branch, as it was the larger branch, contained more water, and was wider and discharged more water at its mouth. This would locate the Maryland corner somewhere in the southern part of Pendleton County; and the south branch then being the line, Maryland would have taken from Virginia large portions of Hampshire, Hardy, Pendleton and now Mineral and Grant Counties, and part of Preston County, amounting in all to nearly a half million of acres.

It is true that Maryland, by the act of 1818, recognized the north branch, but claimed its head was still west of the "Fairfax Stone." But even that act, she insisted, was but a proposed compromise measure, which, as Virginia refused to accede to, she had the right to abandon. (See Report of Maryland Commissioners, Doc. No. 1, *Virginal Journal and Documents H. D.*, 1832-3.)

By these reports and documents it appears that, under the Maryland act of 1818, the Governor of Maryland appointed commissioners, two of whom E. F. Chambers and James Boyle, in 1824, met the Virginia commissioners, H. L. Opie, T. F. Mason and Herman Boye, who, after consultation, could not agree upon the Fairfax Stone as the boundary corner or mark. Col. Boyle in his report to the Maryland legislature said: "The only question for consideration is, whether the north or south branch is considered the first fountain of the Potomac." He then goes on to review the patent of Lord Baltimore, and of Culpepper under which Lord Fairfax held, and discusses the peculiar phraseology of

those charters. In the same report, Col. Boyle speaks of the old Maryland line as follows:

"The present line (as it is called by a vulgar error) between Virginia and Maryland, was laid down by Francis Deakins, with a view to locate bounties of land to the war-worn veterans of the Maryland line, and in a spirit of grateful remembrance for their services, he was expressly enjoined to avoid all conflicting title. This line is declared by the legislature of this State in 1788, to be far within that which this State may rightfully claim as its western boundary and that at a time of more leisure, the consideration of the legislature ought to be drawn to the western boundaries of this State."

The writer examined the acts of Maryland of 1788, and found that, by a resolution passed April, 1787, the Governor and Council appointed and employed Francis Deakins and others to survey and lay off for the Maryland soldiers 50 acre tracts of land in Washington County west of Fort Cumberland. It is also recited that Francis Deakins had finished the said survey and "returned a general map of the county westward of Fort Cumberland."

The act of Nov., 1788, is entitled, "An act to dispose of the reserved lands westward of Fort Cumberland in Washington County and to fulfill the engagements of this State to the officers and soldiers of the Maryland line in the service of the United States." The preamble of the act refers to the number of soldiers as 2475, and then says:

Be it enacted: That 2475 of the aforesaid lots, contained in the following limits, to wit: Beginning at the mouth of Savage River and running with the north branch of the Potomac River to the head thereof, thence north with the present supposed boundary line of Maryland until the intersection," etc.

Afterwards, in this same act of 1788, chap. 44, sec. 5, this boundary

line is referred to as a "temporary meridian," run far within our just limits, to avoid a conflict with Virginia. While the Maryland act speaks of running up the north branch of the Potomac to the head thereof, Francis Deakins stopped at the Fairfax Stone and then ran the boundary line north to the Pennsylvania line, up to which he laid out the Maryland soldiers' lands as stated in the boundary calls in the act of 1788.

Now, this running of the old Maryland boundary line was her own work. Deakins made a map of Washington County and returned it, as recited in the act. This was before the formation of Allegheny County. As a fact, the map showed the boundary line as run by Deakins, though Maryland then and afterwards insisted that this boundary line "was far within her just limits," because she claimed to the first fountain of the south branch of the Potomac. Prior to 1852, Maryland repudiated the Fairfax Stone as the starting point for her western line; consequently, prior to '52, she repudiated the line now called the New Maryland line, because it starts from the Fairfax Stone. Virginia all the time claimed the Fairfax Stone as the commencing point, and Virginians soon after 1788 began to take up lands to the old Maryland line, lay warrants on them, and secure patents for them. It was notorious and well known by settlers on both sides of the line, as to where the Maryland line (so-called) ran. Virginia took possession of and exercised jurisdiction to this line.

Among the documents sent by Gov. Kent of Maryland to Gov. John Tyler of Virginia, in 1832, about this boundary line, is a petition of several citizens relative to the divisional line between Maryland and Virginia:

"To the Honorable the General Assembly of Maryland: Your undersigned petitioners beg leave to represent to your honorable body, that they have

lived for a long time (some five, and from that to twenty years) on a tract of land called the Diadem in Alleghany County, Md., and have cleared considerably on our plantations; about five years back a Mr. William Elliott and Abraham Jeffries laid a Virginia land warrant on the same tract of land, and demanded possession of our improvements. We refused on the plea that we lived in Maryland, and on another man's land. We were shortly after notified to attend at Kingwood court where an ejectment suit was brought against us. We refused as before, on the same grounds, that we lived in Maryland and would not attend to any precept from the other side of the line. We sometime after were visited by the sheriff and requested to give possession. We again refused, as before, and he left us in possession of our homes. A few days after came the sheriff, with a force of eighteen armed men, some with guns, some with axes, and others with dirks and knives, and again demanded possession. The man of the house refused, and immediately the door was dashed to pieces and the family torn from their house, the furniture thrown out of doors, in the midst of a heavy rain, from which treatment he received considerable damage and great inconvenience. We have been paying taxes in Alleghany County, and are now called on to pay taxes in the County of Preston, and our property threatened to be sold if their demands are not promptly paid. We have long been in Maryland and have no other protection. We trust the honorable legislature will consider our cases, and give us some relief from our oppressors for which we feel in duty bound to pray.

HENRY SINES, JOHN SUMMERS,
ADAM FEATHER, S. SUMMERS.

Among all the documents sent by the Governor of Maryland to the Governor of Virginia, this was the only one showing a conflict between citizens of the respective States up to that time near the old boundary line; and we presume Maryland presented her best case. The petition shows

that Virginia was exercising jurisdiction and enforcing her laws over that territory, and granting it by patents; while it also shows, that the petitioners were mere squatters, without any title or patents from Maryland, for they certainly would have alleged it if they held under such Maryland titles, especially as they were asking that State to protect them in their rights and property.

From 1832 till 1852, Virginia continued to exercise jurisdiction to the Deakins line, and Virginians continued to take up land by Virginia patents up to that line.

In 1852, for the first time, Maryland concluded to abandon all other claims, and agree to the Fairfax stone as the southern starting point of the western boundary line. Accordingly, May 27, 1852, the General Assembly of Maryland passed the following act (Chap. 275):

An Act for running and marking the western boundary line of this State.

"WHEREAS, It is of great importance that the western territorial limits of the State of Maryland be clearly defined, and her boundaries permanently established; and

"WHEREAS, The true location of the western line of Maryland between the States of Maryland and Virginia, beginning at or near the Fairfax Stone on the north branch of the Potomac river, at or near its source, and running a due north line to the State of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise; and,

"WHEREAS, The States of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits in ejectment are now pending in the circuit court of Alleghany County, in the State of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the State of Virginia, which cannot be justly settled without establishing said boundary line;

Sec. 1. "Be it enacted," etc.—this section opens correspondence with the Governor of Virginia and provides for appointment of commissioners.

Sec. 2 provides that the commissioners shall accurately survey, trace and mark the line, "beginning therefor at the said Fairfax Stone and running thence due north." It also provides for the commissioners to make report to their respective States, and "upon ratification of such report by the State of Virginia and the State of Maryland through their respective legislatures, the said boundary line shall be fixed and established and so remain forever, unless changed by mutual consent of the said States."

We have already referred to the running of the old line by Francis Deakins, which was shown by his map returned, and by the acts of Maryland, which recognized it, and by the people of Virginia who laid Virginia patents on lands up to that line, and the jurisdiction of Virginia by the enforcement of her laws up to that line. This line is now recognized by this act of Maryland: in the preamble the legislature says:

"The true location of the western line of Maryland between the States of Maryland and Virginia, beginning at or near the Fairfax Stone on the North Branch of the Potomac River, at or near its source, and running in a due north line to the State of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise."

What line was lost? What "marks" were "destroyed by time or otherwise?" Certainly not the new line, which had never been run. A line never ran could not be lost; a line never ran could not have its marks destroyed. The line referred to and recognized now by the legislature of Maryland, was the old Francis Deakins line, the old Maryland line. Hence, in section 2 it provides that "the commissioners shall cause the said line to be accurately surveyed, traced

and marked with suitable monuments." The very word "traced" shows that the legislature had in mind the old line run by Deakins. The map of Deakins showed that the line ran north; his survey as recited in the Maryland act of 1788, ran the line north, and the Maryland commissioners in 1832 referred to it as a temporary *meridian*, which is a north and south line; and, consequently, the Maryland legislature provided for retracing and remarking the old Maryland line, assuming that it ran due north. If it was not a true north and south line it was Maryland's fault: because it was run by herself, and with reference to it, people acquired titles who should not suffer from her blunder.

In 1858, Virginia passed an act also to appoint commissioners to settle this boundary line. Under the Maryland act of 1852 Thomas J. Lee was appointed commissioner, and under the Virginia act, Angus W. McDonald. In 1858, they obtained the services of Lieut. N. Michler, of the U. S. Topographical Engineers, with a corps of surveyors, and they ran the disputed southern boundary line on the Eastern shore of Maryland. On this survey McDonald and Lee disagreed, and afterwards, when they came to the Fairfax Stone, the commissioners also disagreed. McDonald left, and Michler, with Lee alone, ran what is called the New Maryland line.

The report of Lieut. Michler was full and complete, and we suppose his work was accurately done. His complete report, with fine maps, was returned to Annapolis, Maryland. Lee, in his report, dated Dec. 8, 1859, refers to his disagreement with Com'r McDonald, and says:

At my last meeting with the commissioner for Virginia (Sept. 19) I found we entertained very different views as to the results ascertained, upon *both the south-east and northwest lines, from the survey we had caused to be made*, I stated to Mr.

McDonald, informally, that I might at the proper time, insist that the line from Watkins' Point to the sea, should be an east line; and he, on the other hand, for the first time, suggested new views as to the location of the north-western boundary, which he intended to present."

Maryland refused to confirm the eastern line from Watkins' Point on the eastern shore to the sea, and since the war that line was settled by arbitration between Virginia and Maryland.

McDonald reported in 1860 to the legislature of Virginia against the western line as run by Michler. Gov. Wise, in a message to that legislature, approved of McDonald's course, and made an argument against the new line as run by Michler. Upon McDonald's report and Wise's message, the legislature of Virginia, March 10, 1860, passed an act substantially approving of the eastern line run by Michler, but refusing to confirm the western line. The converse of this was done at the same time by the Maryland legislature. The dispute between the commissioners about the western line was as to the correct translation of the patent to Lord Baltimore, which was in Latin, giving the course of the western line with reference to the first fountain of the Potomac. And yet the Maryland act provided that it should take effect only when ratified and confirmed by both States.

It turned out that the new Maryland line run by Michler in '59 did not run upon the old line run by Francis Deakins at all, but varied from it, striking the Pennsylvania line three-quarters of a mile west from the old line. Now, it may be true that the new line was run by an experienced U. S. engineer, with better instruments than used by Deakins. It may be true that the new line is a true north and south line, and that Deakins used a common surveyor's

compass and ran east of north instead of due north; or it may be that, in 71 years, the difference of time between the running of the old and new line the variation of the compass would account for this divergence. Be that as it may, the old line was the act of Maryland herself—an open and notorious act—which was always supposed by Maryland and Virginia to be a correct north and south line, if the Fairfax Stone was the starting point; and as the people of Virginia acquired their titles with reference to this Francis Deakins line, in equity and good conscience, Maryland ought to respect their titles so acquired, especially if West Virginia now yields the old line and confirms the new, as Maryland well knew that the new line was not established until also confirmed by Virginia or West Virginia.

In 1826, when this boundary question was before the legislature of Maryland, a series of resolutions were passed by that body. The first provided for the Governor and Council to appoint commissioners to meet Virginia commissioners to settle the question and establish the line. The second resolution provided, in case of a disagreement between the two States, that the Governor of Delaware should select an umpire to settle the controversy. The third resolution is as follows:

Resolved, That the compact or agreement entered into by the aforesaid commissioners, or in case of disagreement and appointment of an umpire as herein provided, the award of the said umpire shall be final and conclusive on the State, and the faith of the State is hereby pledged to make such legislative enactment as may be necessary to secure all rights derived from the State of Virginia to lands lying within any part of the territory now in dispute between the two States, which shall be adjudged to belong to this State; *provided*, however, and it is further

Resolved, That nothing herein contained shall have any effect unless the

legislature of Virginia shall first provide," etc. (that is agree to appoint commissioners and have umpire appointed by the Governor of Delaware) and also "pledged the faith" of Virginia "that all rights derived under Maryland to lands lying within any of the disputed territory which should be adjudged to belong to Virginia, should be respected.

In 1832, exactly the same resolutions were again passed by the legislature of Maryland, and copies of the resolutions were sent by the Governor of Maryland to the Governor of Virginia. Such recommendations were always made by States, upon confirming reports of commissioners establishing newly-run boundary lines. The commissioners of each State would recommend their State to confirm the titles of those citizens transferred from the other State. Now, read the act of West Virginia of May 3, 1887, and compare it with these resolutions of the legislature of Maryland passed in 1826 and 1832. West Virginia asks Maryland to do just what she agreed to do—just what she pledged herself to do, Maryland pledges "the faith of the State" to make such legislative enactments as may be necessary "to secure all rights derived from the State of Virginia to lands lying within any part of the territory now in dispute between the two States, which shall be adjudged to belong to this State." Why! that is exactly what West Virginia in her act asked and proposed, and no more.

No wonder the Attorney-General of Maryland expressed his surprise when first informed of the West Virginia act, and inquired whether our Governor had communicated it to the Governor of Maryland, because he knew it was the uniform history of the settlement of these boundary questions by commissioners between States, for the commissioners to recommend and the State to pass acts confirming the titles derived from the other State, to lands transferred to it.

Is Maryland less fair, less just and honorable, than in 1826 and 1832? The fact is, the Marylanders who held titles from Maryland prior to 1859, calling for the boundary line, are now extending by construction their lines to the new boundary line, thus overlapping Virginia titles and causing the serious conflicts we have already referred to. We do not believe Maryland has issued any patents calling for the new line, and we know West Virginia has issued no patents at all on the disputed territory since her organization, as no patents are allowed to be issued by our Constitution. We are charitable enough to believe that Maryland did not understand the West Virginia act, or she would have accepted it. If our act was not right, she might and ought to have modified it. It is certain, by every consideration of equity and justice and honor, in view of the fact that Maryland ran the old line herself and gave her solemn pledge to protect our people in the titles to their lands, that they should receive some protection from Maryland, especially as we now give her all the disputed territory and establish the line as she wants it.

If the case must be settled between the two States by a suit, it will be by a bill in equity filed in the Supreme Court of the United States, by one State against the other, and by a cross-bill filed by the defendant against the plaintiff State. In the case of Rhode Island vs. Massachusetts, in 12 Peters, the court held that it had jurisdiction to settle the boundary dispute between States, and would settle it upon the same principle that disputes are settled between individuals about the boundary lines of tracts of lands.

Considering that Maryland herself ran the old Maryland boundary line, and herself made the mistake in not running it due north, that for more than seventy years Virginians acquired titles with reference to that

old line and Virginia for that period exercised her jurisdiction with reference to that line, can any one doubt as to what would be the decision of the Supreme Court of the United States upon a bill in equity in such a case? We think not.

In conclusion, we say that Maryland made the old line herself, and in fact and in practice treated it as the *de facto* boundary line from 1788 to 1852, a period of 64 years, while the same time in theory she claimed *de jure* another line running to the first fountain of the south branch of the Potomac; that in 1852, she changed her claim and recognized the old line running from the Fairfax Stone as both *de jure* and *de facto* the boundary line, as the act provided for *re-tracing* it and restoring the lost marks. This recognition continued till 1859, a period of seven years, when the line run by Lieut. Michler was found to run west of the old. Then Maryland passed over from the old to the new line and began to claim jurisdiction to the new line, which she has continued to assert till the present time, a period of nearly thirty years, while for a hundred years Virginia and West Virginia have claimed and asserted their jurisdiction to the old line, and during all that time their people have acquired titles to and possessed the lands in dispute. Considering, therefore, the condition now of this controversy, we think West Virginia ought to pass another act, providing for its submission to arbitration. This might be done by West Virginia selecting the Governor of a neighboring State, and Maryland selecting the Governor of another State, with leave to them to choose an umpire. The submission should include the whole matter, including the rights of citizens and their conflicts of titles in the disputed territory. The award of the arbitrators, after being confirmed by the two States, ought to be approved by an act of Congress.